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To Holland & Knight LLP**

September 19, 2011

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## **VIA HAND DELIVERY**

Marlene H. Dortch, Esq., Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**FILED/ACCEPTED**

**Attn: Disability Rights Office,  
Consumer & Governmental Affairs Bureau**

**SEP 19 2011**

Federal Communications Commission  
Office of the Secretary

Re: Informal Complaint of Sandra Bass  
FCC Complaint No. 11-C00324077-FC

Dear Ms. Dortch:

On behalf of WHDH-TV, the licensee of WHDH, Boston, Massachusetts, this letter responds to the above-referenced informal complaint submitted to the Commission by Sandra Bass using electronic Form 2000C – Disability Access Complaint (the “Complaint”). Through a *Notice of Informal Complaint* dated August 19, 2011, the Commission informed WHDH of the Complaint.<sup>1</sup> On August 22, 2011, WHDH’s counsel sent a letter to Ms. Bass acknowledging receipt of the *Notice* and Complaint. Attached hereto is the supporting declaration of Christian Wayland, General Manager of WHDH-TV.

In the Complaint, Ms. Bass alleged that, on “06/21/2011 15:00:00:PM,” “there was no communication for the Deaf.” In addition, in response to the request to provide a “[d]etailed description of the emergency,” Ms. Bass stated that “[t]here was a tornado. Also the date 7/26/2011 micro burst.” WHDH interprets this description as Ms. Bass alleging that WHDH failed to make emergency information accessible to individuals who are deaf or hard of hearing on both June 21, 2011 and July 26, 2011. Although WHDH regrets that Ms. Bass believes it failed to make emergency information fully accessible, WHDH must respectfully disagree for the reasons detailed below. In support of this response, WHDH includes the following three DVD recordings of its programming:

1. June 21, 2011 from 15:00:00 to 23:00:00 (“*June Recording*”);
2. July 26, 2011 from 07:00:00 to 15:00:00 (“*July Recording I*”); and
3. July 26, 2011 from 15:00:00 to 23:00:00 (“*July Recording II*”).

<sup>1</sup> The August 19, 2011 date of the *Notice* established September 18, 2011 as the deadline for WHDH’s response. However, because September 18, 2011 was a Sunday, the deadline automatically became September 19, 2011. See 47 C.F.R. §1.4.

The Complaint first alleges that WHDH failed to make emergency information accessible on June 21, 2011 at 15:00:00. However, WHDH did not broadcast any emergency information on that date. Specifically, at 15:00:00, WHDH was airing its regularly-scheduled programming, not news programming, let alone emergency information programming. At 15:45:58, WHDH did have a "Breaking News" promotional spot which referenced the weather, but rather than noting any dangerous conditions, WHDH personnel stated: "And weather-wise, just a gorgeous sunny day out there..."<sup>2</sup>

The Complaint also alleges a failure to make emergency information accessible on July 26, 2011. Because the Complaint does not specify a time, WHDH scrutinized all of its programming from that date. Although there were severe weather watches and warnings, WHDH expended significant resources in order to fully inform the public as to potential threats, and at no time did WHDH fail to make emergency information fully accessible. WHDH therefore complied with §79.2 of the Commission's rules.

During the afternoon of July 26, 2011, forecasts indicated that distant weather events – specifically, thunderstorms then located in New York State – could potentially threaten the WHDH viewing area several hours later. In order to provide its viewers with substantial notice that severe weather could potentially affect them later in the day, at 14:43:05, WHDH interrupted its regularly-scheduled programming with a "Weather Alert."<sup>3</sup> In anticipation of this Alert, at 14:35:00, WHDH contacted its live captioning service, U.S. Captioning Co. ("USCC"). However, USCC could not immediately provide captioning for WHDH because it had just received calls from several other stations requesting its services.<sup>4</sup> Despite this lack of captioning, which lasted only one minute and ten seconds, WHDH did not violate any FCC regulation.

As *July Recording II* demonstrates, at all other times WHDH fully captioned its programming, including weather alerts at 15:00:04, 15:30:04 and 15:46:53, as well as during its regularly-scheduled 4:00 p.m. newscast. WHDH also notes the great lengths it went to during that newscast to provide viewers with all necessary information. WHDH broadcast well over an hour of programming focused on the weather, which by then had become severe to the west of WHDH's service area. In addition to the substantial information provided by its own personnel, this programming included interviews with a spokesperson from the National Weather Service and the mayor of a town to the west of WHDH's service area that had been hit by the storms. Moreover, even though this entire newscast contained closed captioning, WHDH constantly provided other visual aids, including maps, on-screen radar, a lengthy scroll, and various graphics providing the critical details of the severe weather.

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<sup>2</sup> *June Recording* at 15:46:27; *see id.* at 16:15:40 ("...beautiful evening but rain coming later in the week...").

<sup>3</sup> *See July Recording I* at 14:43:05.

<sup>4</sup> Typically, once WHDH's mid-day news programming has ended, USCC does not again provide live captioning for WHDH until its regularly-scheduled 4:00 p.m. newscast.

The Weather Alert Did Not Contain "Emergency Information"

Section 79.2 requires that emergency information provided in the audio portion of programming be made accessible to persons with hearing disabilities. This rule defines "emergency information" as:

Information, about a *current emergency*, that is intended to further the protection of life, health, safety, and property, *i.e.*, critical details regarding the emergency and how to respond to the emergency.<sup>5</sup>

As the Commission has noted, "[t]he question of whether a particular incident or event is an 'emergency' under this rule is not the same as whether particular information broadcast about the event is 'emergency information.'"<sup>6</sup> In other words, only when the information "is intended to further the protection of life, health, safety, and property" of a station's viewers does it become "emergency information" that must be made accessible.

At the time of the Weather Alert, thunderstorm warnings for the WHDH service area had not even been issued. Rather, because of the storms' significant distance from that geographic area and the uncertainty as to the storms' future direction and strength, only thunderstorm "watches" were in effect, even in western Massachusetts, which is well outside WHDH's service area.<sup>7</sup> At the time, actual storms were only occurring in New York State,<sup>8</sup> which is hundreds of miles from WHDH's service area.<sup>9</sup> Clearly, this was not a "current emergency" or "immediate weather" situation with respect to WHDH's viewers.<sup>10</sup>

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<sup>5</sup> 47 C.F.R. §79.2(a)(2) (emphasis added).

<sup>6</sup> *Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities*, Public Notice, DA 06-1483, p. 3 (July 20, 2006).

<sup>7</sup> *See July Recording I* at 14:43:10 (noting that there "*may be some strong and severe thunderstorms this afternoon*" and that WHDH had "*a severe thunderstorm watch up. The potential exists for severe thunderstorms.*") (emphasis added).

<sup>8</sup> *See July Recording I* at 14:43:29.

<sup>9</sup> *See* 47 C.F.R. §79.2(b)(2) ("This rule applies to emergency information primarily intended for distribution to an audience in the geographic area in which the emergency is occurring."); *Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities*, Public Notice, 16 FCC Rcd 15348, 15350 (2001) ("*2001 Reminder*") ("FCC rules require video programming distributors to make *local* emergency information that is provided to television viewers accessible..." (emphasis added)).

<sup>10</sup> *See Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities*, Public Notice, 18 FCC Rcd 14670, 14670 (2003) ("Emergency information is information that helps to protect the life, health, safety or property, and can include information about *immediate* weather situations..." )

In fact, the severe weather continued moving southwest as it subsided so that WHDH's service area was not hit by any extreme weather events.<sup>11</sup> In other words, this Weather Alert did not concern weather that would require WHDH viewers to take immediate, life-saving actions or include instructions to take such actions. This is significant because "the Commission require[s] video programming distributors to display emergency information in a timely manner so that viewers can *respond to a current emergency before becoming endangered*."<sup>12</sup> Therefore, this situation differs significantly from those in which the Commission has previously found accessibility violations.<sup>13</sup> Moreover, at the time, there was no indication that these distant thunderstorms were likely to cause tornadoes or other dangerous weather conditions.<sup>14</sup> In sum, because there was no current or immediate emergency there were no "critical details regarding the emergency and how to respond to the emergency," and thus WHDH did not even have "emergency information" to broadcast at the time of this initial Weather Alert. Accordingly, the information contained in this Weather Alert cannot constitute "emergency information" subject to the Commission's accessibility rule.<sup>15</sup>

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(emphasis added); *2001 Reminder*, 16 FCC Rcd at 15351 (noting that what qualifies as an emergency includes "*immediate weather situations...*") (emphasis added).

<sup>11</sup> See *July Recording II* at 17:32:00.

<sup>12</sup> *McGraw-Hill Broadcasting Co., Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3981, 3983-84 (2005).

<sup>13</sup> See, e.g., *id.* (noting that residents had to evacuate to escape wildfires that did, in fact, cause loss of life, injuries, and extensive damage to property); *Midwest Television, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3959 (2005) (noting that residents had to evacuate to escape wildfires that did, in fact, cause loss of life, injuries, and extensive damage to property); *Waterman Broadcasting Corp. of Florida, Inc.*, Notice of Apparent Liability for Forfeiture, DA 05-2258, ¶ 13 (Aug. 9, 2005) (noting "that Hurricane Charley's destructive force and rapidly changing course made it vital that the stations provide emergency information visually to avoid serious bodily harm or loss of life for persons with hearing disabilities.")

<sup>14</sup> Section 79.2(a)(2) provides a non-exhaustive list of the types of emergencies covered. Although this list includes tornadoes, it does not mention thunderstorms, which are a very common occurrence along the East Coast during the summer months.

<sup>15</sup> See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Acts of 1996, and Accessibility of Emergency Programming*, Second Report and Order, 15 FCC Rcd 6615, 6617-18, ¶ 6 (2000) ("*Second R&O*") ("Under this rule, distributors are not required to provide in an accessible format all of the information about an emergency situation that they are providing to viewers aurally, only the aural information intended to further the protection of life, health, safety, and property.").

The Lack of Captioning During the Weather Alert Was *De Minimis* and Reasonable

Although WHDH generally is obligated to caption all new, nonexempt programming,<sup>16</sup> a *de minimis* or reasonable failure such as this does not constitute a violation of the closed captioning rule.<sup>17</sup> As noted, despite its best efforts, WHDH could not immediately secure captioning resources on such short notice.<sup>18</sup> Because WHDH wanted to provide its viewers with substantial notice that severe thunderstorms could enter its service area later in the day, it chose to broadcast the Weather Alert even though it could not provide closed captioning at that particular moment.<sup>19</sup> Moreover, WHDH made good faith efforts to secure captioning services prior to this Weather Alert, and substantially before any severe weather could enter its service area and thereby potentially affect its viewers.<sup>20</sup>

That WHDH's brief inability to provide captions was both *de minimis* and reasonable is further demonstrated by the fact that its subsequent weather alert, which aired only fifteen minutes later, contained closed captioning.<sup>21</sup> Clearly, WHDH "provide[d] closed captioning within a reasonable period of time."<sup>22</sup> WHDH's actions thus contrast significantly to those instances where the Commission has found accessibility violations – *i.e.*, where stations failed to provide visual depictions of emergency information for substantial periods of time.<sup>23</sup> WHDH again notes that the storms were a significant distance away from its service area, that it

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<sup>16</sup> See 47 C.F.R. §79.1(b)(1)(iv).

<sup>17</sup> See 47 C.F.R. §79.1(e)(10); *Clarification of Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning*, Public Notice, 21 FCC Rcd 9066, 9066-67 (2006) ("Clarification PN").

<sup>18</sup> See *Clarification PN*, 21 FCC Rcd at 9066 (recognizing "that in emergency situations it may not be feasible for video programmers on short notice to secure captioning resources and immediately provide closed captioning.").

<sup>19</sup> See *id.* ("[W]e should not place video programmers in a position where they are forced to choose between broadcasting emergency information and violating our closed captioning rules or failing to provide their viewers with vital emergency information.").

<sup>20</sup> See *id.* at 9067.

<sup>21</sup> See *July Recording II* at 15:00:04.

<sup>22</sup> See *Clarification PN*, 21 FCC Rcd at 9067.

<sup>23</sup> See, e.g., *ACC Licensee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 9832 (2005) (liability for failure to provide visual presentation for 2.5 hours); *McGraw-Hill*, 20 FCC Rcd 3981 (liability only with respect to those instances where visual presentation delayed "at least 30 minutes"); *Midwest*, 20 FCC Rcd 3959 (liability only with respect to those instances where visual presentation delayed "at least 30 minutes"); *Channel 51 of San Diego, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3969 (2005) (liability only with respect to those instances where visual presentation delayed "at least 30 minutes").

remained only a possibility that severe weather could affect its viewers, and that no evidence of possible tornadoes existed at the time.<sup>24</sup>

#### The Weather Alert Visually Depicted the Vast Majority of the Aural Information

Stations may fully comply with §79.2 either through closed captioning or other methods of visual presentation, such as open captioning, crawls, or scrolls.<sup>25</sup> Other acceptable methods of visual presentation include maps, signs, and charts.<sup>26</sup> Accordingly, even if the Commission finds that the information contained in the Weather Alert constituted “emergency information,” WHDH complied with §79.2 because it provided substantial forms of visual presentation.

As noted, the only weather programming that did not contain captions was the brief Weather Alert that began at 14:43:05. At all times during this Alert, which lasted just over one minute, the WHDH meteorologist appeared before a full-screen map which included a “Weather Watches and Warnings” graphic. At first, the map displayed various color-coded counties in New York, Massachusetts and other bordering states. The orange-colored counties (all of which were in New York State) had thunderstorm warnings in effect, the pink-colored counties were only under thunderstorm watches, and the remaining counties had no warnings or watches in effect. In addition, in the lower-right corner of the screen, WHDH provided graphics informing viewers of a thunderstorm watch for Middlesex County lasting until 10:00 p.m. and then of a thunderstorm watch for Berkshire County lasting until 7:00 p.m.<sup>27</sup> Halfway through the Weather Alert, WHDH replaced the color-coded map with a full-screen radar showing that the storms still were located only in New York State.<sup>28</sup> WHDH thus provided other methods of visual presentation for nearly all of the information provided aurally during this short Weather Alert. And it visually displayed all of the most important information, none of which constituted “emergency information” subject to the accessibility rule in the first place.<sup>29</sup> WHDH therefore

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<sup>24</sup> See *Clarification PN*, 21 FCC Rcd at 9067 (“[W]hat is de minimis or reasonable may be affected by the nature and extent of the emergency situation.”).

<sup>25</sup> See 47 C.F.R. §79.2(b)(1)(i); *Reminder Regarding Video Programming Distributors’ Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities*, Public Notice, DA 11-1070, p. 2 (June 17, 2011); *Second R&O*, 15 FCC Rcd at 6618 & 6620-21.

<sup>26</sup> See *Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning*, Public Notice, DA 06-2627, p. 3 (Dec. 29, 2006); *McGraw-Hill*, 20 FCC Rcd at 3983.

<sup>27</sup> See *July Recording I* at 14:43:18 and 14:43:23.

<sup>28</sup> See *id.* at 14:43:32.

<sup>29</sup> WHDH notes that this Weather Alert did not contain any “critical details regarding the emergency and how to respond to the emergency” both because there were no current or immediate emergencies and because there was no need for viewers to take action with respect to weather which was occurring hundreds of miles away and posed only a potential future threat.

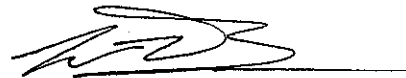
complied with §79.2, particularly because the Commission permits video programmers to rely on their own good faith judgments in determining whether particular details need to be made accessible.<sup>30</sup>

### Conclusion

If the Commission finds an accessibility violation despite WHDH's various other methods of visual presentation provided on very short notice, the Commission could deter, or delay, emergency broadcasts. WHDH, pursuant to the good faith discretion granted to it by the Commission, determined that it would interrupt its regularly-scheduled programming to provide information related to a potential future weather incident. Television licensees, including WHDH, are under no specific statutory or regulatory obligation to provide the kinds of weather coverage that are the subject of the Complaint.<sup>31</sup> Imposing sanctions under these circumstances could chill the willingness of licensees in the future to provide timely weather coverage.

Based on the foregoing, WHDH respectfully requests that the Commission dismiss the Complaint. In the event that there are questions concerning this matter, please communicate with the undersigned.

Very truly yours,



Charles R. Naftalin  
Leighton T. Brown  
*Counsel to WHDH-TV*

cc: Sandra Bass (*via U.S. Mail*)  
Deaf Inc.  
215 Brighton Avenue  
Allston, MA 02134

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<sup>30</sup> See *Second R&O*, 15 FCC Rcd at 6617, ¶ 5.

<sup>31</sup> See *2001 Reminder*, 16 FCC Rcd at 15352 ("The rule does not require any entity to provide emergency information.").

## DECLARATION OF CHRISTIAN WAYLAND

I, Christian Wayland, declare the following.

I am more than 18 years of age, am competent to testify, and I understand my obligation to tell the truth.

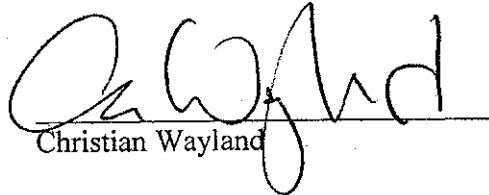
I am the General Manager of WHDH-TV, the licensee of WHDH, Boston, Massachusetts. I have been the General Manager of WHDH-TV since November 3, 2008.

I have read a copy of the informal complaint of Sandra Bass submitted to the Federal Communications Commission ("FCC") as provided by the FCC by notice dated August 19, 2011. I am familiar with the circumstances of WHDH programming that appears to be the subject of Ms. Bass' complaint.

I participated in the preparation of the September 19, 2011 WHDH response to Ms. Bass' complaint, including by reading and approving of a materially complete final draft of it. Except with respect to matters of public record, or for which the FCC may take official notice, the assertions of fact in WHDH's response are correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

September 19, 2011

  
Christian Wayland